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BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, D.C. 20268–0001

STATUTORY REVIEW OF THE SYSTEM FOR REGULATING RATES AND CLASSES FOR MARKET-DOMINANT PRODUCTS	Docket No. RM2017-3

OPPOSITION OF THE UNITED STATES POSTAL SERVICE TO MOTION FOR ISSUANCE OF INFORMATION REQUEST
(January 26, 2018)

On January 19, 2018, the National Postal Policy Council (NPPC) and the National Association of Presort Mailers (NAPM) asked the Commission to request information about the Postal Service's recent capital investment decisions: specifically, the past five years' worth of reports of management's deliberations on those investment decisions, as well as any and all after-the-fact analysis of the results of those investments.[1] Contrary to NPPC and NAPM's claims, the requested information is not relevant to this rulemaking, and any theoretical benefit would be far outweighed by the burden to the Postal Service. The motion should be denied.

I. THE MOTION'S DESIRED PRUDENCE REVIEW IS AT ODDS WITH THE CLEARLY ESTABLISHED FOCUS OF THIS PROCEEDING AND IS FAR REMOVED FROM THE COMMISSION'S TASK OF BALANCING THE OBJECTIVES OF THE PAEA

The Commission's discussion of the Postal Service's capital spending in this docket is focused on overall capital spending levels, rather than on reviewing and potentially second-guessing individual spending decisions.[2] In particular, the

[1] *See generally* National Postal Policy Council and National Association of Presort Mailers Motion for Issuance of Information Request, PRC Docket No. RM2017-3 (Jan. 19, 2018) [hereinafter "NPPC-NAPM Motion"].

[2] *Id.* at 1-2 (citing Order No. 4258, Notice of Proposed Rulemaking for the System for Regulating Rates and Classes for Market Dominant Products, PRC Docket No. RM2017-3 (Dec. 1, 2017), at 36, 38-39, 46).

Commission has noted that capital spending levels declined significantly during the PAEA regime and that it is necessary to restore capital spending to prior, and more adequate, levels to ensure achievement of objective 5, as well as other objectives. In fact, the problem of inadequate capital investment levels has been well-recognized by the Commission and other authorities.[3] At no point has the Commission or any other authority suggested that the capital gap would not exist but for imprudent management decisions in the past, nor would it be logical to do so.

The Commission's focus on overall capital spending levels properly reflects the focus of this proceeding. By contrast, the information requested in the motion, relating to the return on investment of individual capital decisions during the past five years, simply has no material bearing on the Commission's task in this rulemaking. Even if the movants could show that certain individual capital investments during the past five years did not achieve the anticipated returns set forth in the relevant DAR, such a showing is fundamentally irrelevant to the question as to the design of a regulatory system that

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See also Order No. 4258 at 50-55 (explaining how the declines in capital spending and capital asset levels constituted a failure of three statutory objectives, and proposing the performance incentive mechanism as a way "to return to pre-PAEA levels of capital outlays" and "to replace the $7.8 billion decrease in net capital assets that occurred in the PAEA era").

[3] *E.g.*, Postal Regulatory Comm'n, Financial Analysis of United States Postal Service Financial Results and 10-K Statement, Fiscal Year 2016 (Mar. 31, 2017), at 28 ("In order for the Postal Service to be competitive in today's growing e-commerce market, it will have to increase its capital expenditures."); *Reforming the Postal Service: Finding a Viable Solution: Hearing Before the House Comm. on Oversight & Gov't Reform*, 114th Cong. at 1-2 (May 11, 2016) (remarks by Committee Chairman Jason Chaffetz) ("Further, the Postal Service lacks the funds it needs for critical infrastructure investments. . . . But if you are going to purchase new delivery vehicles and prepare for the next decade or two, you are going to need some money, and it is something that the Postal Service does not have."); *id.* at 24 (oral statement of Commission Chairman Robert G. Taub) ("Low liquidity levels in recent years have impeded the Postal Service's ability to make capital investments in infrastructure."); *id.* at 32 (written statement of Commission Chairman Taub) ("These low liquidity levels in recent years have impeded the Postal Service's ability to make capital investments in infrastructure and hindered the growth and productivity enhancements in key assets required for primary postal operations."); Gov't Accountability Office, GAO-11-386, United States Postal Service: Strategy Needed to Address Aging Delivery Fleet (May 2011), at 40-41.

enables a prospective level of capital spending that is needed to ensure achievement of the objectives going forward.

Moreover, as discussed further below, the Commission has not, and in fact never has, seen its role as reviewing and potentially second-guessing individual capital spending decisions by the Postal Service. Certainly, the Commission's proposal to incrementally and conditionally reduce the capital gap so as to give the Postal Service the ability to restore overall capital spending to pre-PAEA levels should not occasion more scrutiny over individual capital decisions than in the past, when the Postal Service was actually spending more. As such, and contrary to the assertions raised in the NPPC-NAPM Motion, it is appropriate and consistent for the Commission to focus on overall capital spending levels in this proceeding.

Finally, even if the prudence of prior capital spending decisions somehow were germane to the Commission's task in proposing a system to ensure the prospective achievement of the objectives, such an inquiry sets a much higher bar than NPPC and NAPM's proposed information request suggests. For instance, when the Postal Rate Commission[4] determined whether specific expenses ought to be excluded from the Postal Service's rate base as imprudently incurred, its application of the standard was highly deferential to Postal Service management. Parties proposed to disallow the costs of specific investments in seven rate cases between Docket Nos. R74-1 and

[4] Although the former Postal Rate Commission was formally a distinct legal entity from its successor, the current Commission, the two agencies did not overlap. Their combined history forms a continuous body of postal regulatory precedent that can continue to inform at least some interpretive and policy issues, notwithstanding the PAEA's fundamental changes to the underlying enabling statute. In light of that continuity, and to avoid awkward alternative phrasings, this opposition will use the same shorthand terms ("Commission" and "PRC") to refer to both agencies.

R2000-1; in almost every case, the Commission declined to second-guess the expenses in question.[5] In only one case (Docket No. R74-1) did the Commission adopt a few of the proposed disallowances, and even those disallowances were offset *in toto* by other cost increases.[6]

In the same opinion, the Commission "firmly reject[ed] any notion that its role is that of an 'inspector general' attempting to oversee or vouch for every aspect of the Postal Service's performance or efficiency," recognizing that role as belonging to the Postal Service Governors and subject to ongoing review by the Government Accountability Office, the Office of Management and Budget, and Congress.[7] (And the Postal Service now also has a literal Office of the Inspector General (OIG) to provide yet another layer of performance oversight.[8]) In another opinion, the Commission reminded parties that it "cannot disallow expenses except in extraordinary circumstances."[9] Given the high bar to allegations of imprudence, any relevance of recent management

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[5] Op. & Rec. Dec., PRC Docket No. R2000-1, at ¶¶ 2060-2066 (rejecting proposed disallowance of Periodicals costs allegedly due to insufficient investment in flats sorting equipment); Op. & Rec. Dec., PRC Docket No. R97-1 (May 11, 1998), at ¶¶ 2089-2111, 2118-2120 (rejecting proposed disallowance of capital spending increases); Op. & Rec. Dec., PRC Docket No. R90-1 (Jan. 4, 1991), at ¶¶ 2081-2096 (rejecting proposals to freeze rates on the basis of a "generalized assertion that past losses . . . are the result of faulty management and should be retrospectively disallowed"); Op. & Rec. Dec., PRC Docket No. R87-1 (Mar. 4, 1988), at ¶¶ 2037, 2040 (rejecting proposed disallowance of cost savings forgone from delayed deployment of optical character recognition equipment); Op. & Rec. Dec., PRC Docket No. R76-1 (June 30, 1976), at 65-70 (rejecting proposed disallowance of excess floor space in mail processing facilities); Op. & Rec. Dec., PRC Docket No. R74-1 (Aug. 28, 1975), at 50-55. In addition to these opinions, the Commission also neglected to address parties' proposed disallowances altogether in two cases. *Compare* Op. & Rec. Dec., PRC Docket No. R98-1, *with* Alliance for Nonprofit Mailers Br., PRC Docket No. R90-1 (Oct. 29, 1990), at 44-47; *compare* Op. & Rec. Dec., PRC Docket No. R80-1 (Feb. 19, 1981), *with* Associated Third Class Mail Users Br., PRC Docket No. R80-1 (Dec. 19, 1980), at 11-16.

[6] *See* Op. & Rec. Dec., PRC Docket No. R74-1, at 28 & fn.1, 50-55.

[7] *Id.* at 23 & fn.2, 49.

[8] 39 U.S.C. §§ 202(e), 410(b)(10). *See also* Inspector General Act of 1978, Pub. L. No. 95-452, §§ 2, 4(a), 8G(f), *codified at* 5 U.S.C. App.

[9] Op. & Rec. Dec., PRC Docket No. R97-1, at ¶ 2119.

decisions and their arguable prudence is all the more attenuated.[10]

II. NPPC AND NAPM'S OWN ARGUMENTS DEMONSTRATE THAT THE INFORMATION REQUESTED IS IRRELEVANT

NPPC and NAPM point to the Flats Sequencing System (FSS) to support their position.[11] But NPPC and NAPM overlook the fact that, according to the same OIG report that they cite, the FSS investment was approved in 2006.[12] Thus, the FSS investment decision predates any period relevant to either the motion or this proceeding.

Further, for the identified 2013-2017 time period, "reviews of Postal Service investment initiatives [that] have been made public" quite clearly state the opposite of what NPPC and NAPM claim that those initiatives "suggest."[13] The OIG—which, unlike the Commission, is expressly charged with auditing and investigating such decisions—has twice concluded that, notwithstanding some issues, the Postal Service's "DARs were reasonable business decisions or were in the best business interest of the Postal Service and identified no systemic issues across all DARs."[14] As such, there is no

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[10] The relevance of the information subject to Request No. 2 is particularly attenuated. As previously explained by the Postal Service, "even assuming that a utility-regulation notion of 'prudence' is relevant here, as the Mailer Groups apparently believe, that notion involves an objective evaluation of what hypothetical reasonable, good-faith managers would have done under the same circumstances and at the time of the relevant investment decisions, not a searching inquiry into management's subjective views on a (now-past) investment." Opposition of the United States Postal Service to Motion for Reconsideration of Order No. 3763, PRC Docket No. RM2017-3 (Feb. 10, 2017), at 18 (citing Indiana Mun. Power Agency v. Fed. Energy Regulatory Comm'n, 56 F.3d 247, 253 (D.C. Cir. 1995); Violet v. Fed. Energy Regulatory Comm'n, 800 F.2d 280, 282-83 (1st Cir. 1986).

[11] *Id.* at 3.

[12] U.S. Postal Serv. Office of the Inspector Gen., No. SM-WP-15-001, Challenges in Controlling Costs with Standard Mail Flats and Periodicals (Feb. 26, 2015), at 8.

[13] *See* NPPC-NAPM Motion at 3 (claiming that such reviews "suggest that the Service may not always manage its investments well").

[14] U.S. Postal Serv. Office of the Inspector Gen., No. CP-CAP-17-001, Fiscal Year 2016 Decision Analysis Report Summary (Dec. 27, 2016), at 2; *see also* U.S. Postal Serv. Office of the Inspector Gen., No. MI-CAP-16-001, Fiscal Year 2015 Decision Analysis Report Summary (Feb. 26, 2016), at 2. NPPC

reason to pursue the proposed information request further.

III. THE PROPOSED INFORMATION REQUEST WOULD IMPOSE BURDENS OUT OF PROPORTION TO THE INFORMATION'S PROBATIVE VALUE

The Commission has never deemed oversight of internal, predecisional, deliberative, and commercially sensitive DARs to be necessary to its responsibilities. This was a wise decision, in terms of the administrative burden involved in Commission proceedings. Production of DARs, including the likely need for redaction review and preparation of an application for non-public treatment, would impose a significant burden on the Postal Service.

The burden is multiplied by the scope of the request. The Postal Service estimates that roughly 40 DARs could be responsive to NPPC and NAPM's proposed question 1 alone, and that number does not account for DARs that may have been withdrawn from the approval process, not approved, or approved for lesser amounts. Those DARs concern programs affecting almost every branch of the Postal Service, from Operations to Information Technology to Engineering to the Inspection Service. As a result, Postal Service counsel would need to consult with myriad separate client groups to determine appropriate redactions and grounds for non-public treatment, as well as to identify materials responsive to question 2, which would be a substantially more burdensome undertaking.

It is unclear how any of the requested materials would advance the Commission's consideration in any meaningful way. Because the burden associated

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and NAPM cite the FY2016 summary in their motion, but neglect to mention the report's principal conclusion. *See* NPPC-NAPM Motion at 3.

with identifying, evaluating, and preparing for filing the information responsive to the proposed information request would far outstrip the dubious relevance of the information, the Commission should deny the NPPC-NAPM motion.

IV. CONCLUSION

The information sought in the motion has no bearing on the proper focus of this proceeding. There is no reason to justify the Commission's consideration of the Postal Service's prior, individual capital spending decisions. Indeed, NPPC and NAPM's proposed information request would have one clear result: it would impose an undue burden on the Postal Service while adding limited to no probative value. The Commission should reject the motion.

Respectfully submitted,
UNITED STATES POSTAL SERVICE

By its attorneys:

Caroline R. Brownlie
Managing Counsel, Legal Strategy

David C. Belt
Chief Counsel, Legal Policy & Legislative Advice

Jacob D. Howley

475 L'Enfant Plaza West, S.W.
Washington, D.C. 20260-1137
(202) 268-2000
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